Filed 9/29/09 California Dermatology Center v. United Healthcare Services CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CALIFORNIA DERMATOLOGY CENTER, INC., et al., Plaintiffs and Appellants, v. UNITED HEALTHCARE SERVICES, INC., et al., Defendants and Respondents.	B207028 (Los Angeles County Super. Ct. No. BS108597)

APPEAL from a judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Cone & Kassel and John Cone for Plaintiffs and Appellants.

Walraven & Lehman and Bryan S. Westerfeld for Defendants and Respondents United Healthcare Services, Inc. and Pacificare Health Plan Administrators, Inc.

After notification that they would be removed from respondents' "preferred provider" lists, plaintiff dermatologists brought this action. Citing the common law right to fair procedure, plaintiffs alleged they should have been given notice and an opportunity to be heard before their removal.

We agree with the trial court's finding that plaintiffs were not entitled to common law fair procedure and its alternative finding that pre-removal procedures provided by respondents satisfied the fair procedure doctrine. We disagree with plaintiffs' additional argument, offered for the first time on appeal, that they were contractually entitled to "due process" before their removal. We affirm the judgment.

BACKGROUND

Respondents United Healthcare Services, Inc. (United) and PacifiCare Health Plan Administrators, Inc. (PacifiCare) are third-party administrators of employee health benefit plans sponsored by employers. They administer the payment of claims for medical services provided to individuals ("members") covered by the employers' plans. The specific plan determines what services are reimbursable and to what extent.

The amount a health plan pays to a health care provider for a covered service depends in part on whether the provider has agreed to charge a discounted rate for the service. Such an agreement is called a "preferred provider" or "network" agreement, and the participating health care providers are the Preferred Provider Organization (PPO). Preferred providers agree to charge a discounted rate in exchange for participation in the network. A PPO often uses a Point of Service (POS) plan, where a primary care physician (the "point of service") can make referrals outside the network.

Plaintiffs Glenn Ledesma and Marshall Goldberg are principals of California Dermatology Center, Inc., which is the parent corporation of Beverly Hills Dermatology Center, Inc., Corona Dermatology Center, Inc., Covina Dermatology Center, Inc., Diamond Bar Dermatology Center, Inc., Garden Grove Dermatology Center, Inc., and Upland Dermatology Center, Inc. (collectively CDC). CDC seeks to provide

dermatology services in Southern California as United's and PacifiCare's preferred provider.

In 2004 and 2006 CDC entered into PPO/POS agreements with PacifiCare (the PacifiCare contracts). In 2005 CDC entered into similar agreements with a third party, California Physicians' Service, Inc. dba Blue Shield of California (Blue Shield; the Blue Shield agreements). Prior to June 23, 2006, United administered health insurance under the Blue Shield agreements CDC.[1] As of June 23, 2006, United became a party to the PacifiCare contracts. CDC was thus United's preferred provider under two different contractual schemes.

Under the PacifiCare contracts, CDC was to provide medical services to PacifiCare's members in return for agreed-upon payment by PacifiCare (and later United). The agreements created no employment or agency relationship, and they allowed CDC to "enter[] into substantially similar agreements with" entities similar to PacifiCare. The agreements permitted termination by either party without cause "at any time by providing the other party at least on[e] hundred eighty (180) days' prior written notice of termination" or with cause "if Provider . . . breaches any material term, covenant or condition of this Agreement . . . and subsequent[ly] fail[s] to cure such breach . . . ."

In sections 4.4 and 4.5 of the PacifiCare contracts CDC agreed it would not bill members directly for any amounts other than specified "copayments, coinsurance, deductible amounts, and amounts for services not covered by the [member's] Plan and agreed to in advance in writing by the [member]," and "[i]n the event of nonpayment by PacifiCare, [CDC] shall not bill any [member] and shall hold [members] harmless." CDC agreed not to charge a member "for medical services denied by PacifiCare [or United] for reason of not being Medically Necessary unless [the member] has, *with knowledge of PacifiCare's determination of a lack of Medical Necessity*, agreed in writing to be responsible for payment . . . ."

---

1 This contract by which it did so is not part of the record.

Beginning on February 8, 2007, in response to complaints from several of its members, United claimed in two letters and a phone call to CDC that CDC was in violation of sections 4.4 and 4.5 of the PacifiCare contracts, directly billing members on claims that had been denied by United. It gave notice on February 22, 2007 that it intended to terminate the PacifiCare contracts, subject to the contracts' 30-day opportunity to cure provision, based on CDC's directly billing United members and other breaches of the contracts, including billing United for services not rendered, billing for services provided by non-physicians, up-coding services (billing for a more expensive procedure than was performed), billing for pathology consultations that did not occur, and resubmitting revised claims for previously denied claims. CDC responded that it was entitled to a detailed specification of the breaches underlying the cause for termination and a pre-termination hearing pursuant to *Potvin v. Metropolitan Life Ins. Co*. (2000) 22 Cal.4th 1060 (*Potvin*). United denied CDC was entitled to a hearing, gave a detailed written explanation of the breaches, and provided CDC an opportunity to respond in writing. CDC replied in detail to each of United's allegations. It did not deny that direct billing had occurred. On the contrary, it justified the billing on the ground that United's refusal to pay the claims meant the claims were not covered by United's plans, and were therefore the patients' responsibility. United replied that it refused to pay the claims not because the services were not covered but because they had not actually been performed. At any rate, CDC was not entitled to bill even for noncovered services unless the members, with knowledge of PacifiCare's determination of a lack of medical necessity, agreed. Members who complained to United denied they were aware that any determination of a lack of medical necessity had been made.

United informed CDC on March 29 and April 6, 2007 that it was considering CDC's arguments and had not made a final decision as to whether to cancel the contracts. However, on April 24, 2007 it notified CDC that it intended to terminate the PacifiCare contracts for cause effective May 1.

On April 30, 2007, the day before the termination was to take effect, CDC sought and received a temporary restraining order, staying termination of the PacifiCare

contracts pending a hearing on CDC's request for a preliminary injunction. It also filed a petition for a writ of traditional or administrative mandamus or alternatively a verified complaint for injunctive and declaratory relief, seeking to prevent United from terminating the PacifiCare contracts without first providing an administrative hearing according to *Potvin*. (It later filed a motion for peremptory writ of mandate on the same grounds. For purposes of this appeal, we treat the petition and motion as one.) CDC alleged United exercises significant market power over the provision of dermatological services by "referring patients seeking dermatologic medical services to [United] Member Physicians" and by "restricting the reimbursement" of United members "to [preferred providers]." It alleged United's termination of its preferred status would cause it to "lose access to about 30 percent of [its] existing patients and 50% of [its] revenue" and will damage its reputation among its patients and peers.

On May 4, 2007, United offered to conduct a hearing where CDC could present evidence and argue why the contracts should not be terminated. CDC asked that the hearing be modeled on Business and Professions Code section 809 et seq., which sets forth a peer-review process for physicians threatened with loss of hospital privileges, and be conducted before a fact-finding panel of three physicians. United refused to employ the procedures CDC requested but allowed that CDC could present evidence, be represented by counsel, and argue its position before a United decisionmaker in a hearing transcribed by a court reporter. United stated it would consider CDC's position in good faith "prior to making a new determination regarding whether to terminate the" agreements. CDC did not respond to this offer.

The trial court denied CDC's request for a preliminary injunction on May 22, 2007.

At the hearing on its petition for a writ of mandamus (and motion for peremptory writ), CDC presented evidence that United's termination of the PacifiCare contracts forced it to close two of its clinics, put two more in jeopardy, and reduced its patient volume by 60% and its revenues by 50%.

United presented evidence regarding its market power. Approximately 58% percent of all insureds in Southern California are enrolled in PPO and POS plans. United administers plans covering 8% of all PPO/POS insureds in Southern California, or 5% of all insureds. PPO and POS plans administered by United generally provide some reimbursement for medical services provided by out-of-network dermatologists. For example, a health plan may pay 95% of eligible charges for in-network providers and 85% for out-of-network providers, allowing members to elect to seek treatment from a nonparticipating provider. In 2006, 17% of the dermatology-related claims processed by United and PacifiCare involved out-of-network dermatologists.

United also presented evidence that CDC directly billed United members for services provided from October 2005 to January 2007, charging more than the applicable copayment. CDC refused to stop its direct billing after demands from United that it do so.

The trial court denied CDC's petition, finding CDC was "not entitled to common law fair procedure with respect to the termination of the network agreements . . . , and in any case, the pre-termination procedures provided to CDC by United were more than sufficient to satisfy the requirements of common law fair procedure." The court entered judgment in favor of United on each of CDC's claims.

CDC timely appeals from that judgment.

DISCUSSION

A. Standard of Review

When reviewing a trial court's ruling on a petition for writ of mandate, we review factual findings under the substantial evidence standard. "We review independently questions of law based on undisputed facts or facts properly found by the trial court." (*Kurz v. Federation of Petanque U.S.A.* (2006) 146 Cal.App.4th 136, 144; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 8.4.2, pp. 8-2 to 8-3.)

B. Due Process

CDC's primary contention on appeal is one it did not raise below. It contends United was obliged to afford CDC "due process" before terminating the PacifiCare contracts. It finds this obligation in the section 7.7 of the Blue Shield agreements, which provided that "[i]n the event of termination of this Agreement by Blue Shield . . . , Provider shall be entitled to those due process procedures which are required of Blue Shield by State or Federal law."

CDC's argument, as we understand it, is that because United decided to terminate the PacifiCare contracts based on CDC's violation of the Blue Shield agreements, Blue Shield's obligation to afford due process before terminating the Blue Shield agreements requires United to do the same before terminating the PacifiCare contracts.

A party may not raise a new contention on appeal unless the facts upon which it is based "were clearly put at issue at trial and are undisputed on appeal." (*Richmond v. Dart Industries, Inc*. (1987) 196 Cal.App.3d 869, 879.) "'[I]f the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial the opposing party should not be required to defend against it on appeal.'" (*Ibid*., citations omitted.)

CDC admits it did not raise its due process argument below but argues the facts upon which it is based were clearly put at issue and are undisputed. We disagree. For its new theory to succeed, CDC must show: (1) United assumed Blue Shield's obligations under the Blue Shield agreements or, as CDC argues on appeal, is estopped from denying those obligations; (2) the obligations apply to United's termination of the PacifiCare contracts; and (3) United decided to terminate the PacifiCare contracts solely because CDC breached the Blue Shield agreements. None of this was explored below.

The contention is therefore waived.

C. Common Law Fair Procedure

CDC alternatively contends its loss of patients and revenue after United terminated the PacifiCare contracts indicates United possesses sufficient economic power

to require that it provide common law fair procedure before delisting CDC as a preferred provider. We disagree.

The common law doctrine of fair procedure holds that "the right to practice a lawful trade or profession is sufficiently 'fundamental' to require substantial protection against arbitrary administrative interference" from a gatekeeper organization. (*Ezekial v. Winkley* (1977) 20 Cal.3d 267, 272; *Yari v. Producers Guild of America, Inc.* (2008) 161 Cal.App.4th 172, 176-177; see *Potvin, supra*, 22 Cal.4th at pp. 1070-1071.) "[T]he right applies only to private decisions which can effectively deprive an individual of the ability to practice a trade or profession." (*Yari, supra*, at p. 177.) A health services administrator like United is a gatekeeper organization.

The obligation of a health services administrator to comply with fair procedure when delisting a preferred provider physician arises when the administrator "possesses power so substantial that the removal significantly impairs the ability of an ordinary, competent physician to practice medicine or a medical specialty in a particular geographic area, thereby affecting an important, substantial economic interest." (*Potvin, supra*, at pp. 1071, 1072, fn. omitted; *Palm Medical Group, Inc. v. State Comp. Ins. Fund* (2008) 161 Cal.App.4th 206 (*Palm Medical Group*).) "Any inquiry regarding the extent of such impairment must be an objective one." (*Potvin, supra*, at p. 1072.) Evidence of a particular physician's loss of income after he or she is delisted, "although relevant, would not be conclusive proof that removal from [the] preferred provider lists will *generally* reduce physician income so significantly as to impair the ability to practice medicine." (*Ibid.*)

"[W]hen the right to fair procedure applies, the decisionmaking 'must be both substantively rational and procedurally fair.' [Citation.]" (*Potvin, supra*, at p. 1066.)

The trial court concluded United owed no duty to afford fair procedure in terminating the PacifiCare contracts and removing CDC from its preferred provider lists. We agree.

Five percent of all insureds in California participate in plans administered by United. (Eight percent of all PPO/POS insureds do.) United is not an exclusive

gatekeeper even as to these insureds, as they could elect to be treated by nonparticipating providers. United's incomplete power to restrict access to 5% of all insureds is not so substantial that removal from its preferred provider lists would significantly impair the ability of an ordinary, competent physician to practice medicine or a medical specialty in Southern California. A delisted physician would still have access to United's members (as a non-preferred provider), to the other 95% of all insureds, and to persons who are uninsured.

CDC argues fair procedure must be afforded if delisting by an insurance administrator significantly impairs the practice of the particular physician being delisted or substantially affects his or her economic interest. It argues the result of United's decision—reduction of its patient volume by 60% and revenues by 50%—indicates United possesses power so substantial that the delisting significantly impaired CDC's ability to provide dermatology services in Southern California. The argument is without merit.

As stated, "[a]ny inquiry regarding the extent of . . . impairment must be an objective one." (*Potvin, supra*, 22 Cal.4th at p. 1072.) A particular physician's loss of income after he or she is delisted does not prove "that removal from [the] preferred provider lists will *generally* reduce physician income so significantly as to impair the ability to practice medicine." (*Ibid*.) CDC's losses therefore do not establish United had the power generally to reduce physician income so significantly as to impair the ability to practice medicine. No authority requires imposition of the fair procedure doctrine simply because cancellation of a private contract substantially affects the economic interests of the non-canceling party.

Because CDC was not entitled to common law fair procedure, we need not determine whether the procedure afforded by United was substantively rational and procedurally fair. In any event, we conclude its pre-termination procedures satisfied the requirements of fair procedure.

Fair procedure requires substantively rational and procedurally fair decisionmaking. (*Potvin, supra,* at p. 1066.) A decision is substantively rational so long

as it is not "arbitrary, capricious, discriminatory, irrational or contrary to public policy." (*Palm Medical Group, supra,* 161 Cal.App.4th at p. 222.)

Here, United decided to terminate the PacifiCare contracts because CDC violated them by billing its members directly. CDC did not deny United had received complaints or that it had directly billed the members, but argued its billing practices did not violate the PacifiCare contracts. We need not decide whether CDC actually breached the contracts, only whether United's conclusion that it had is substantively rational. It is undisputed the contracts forbade direct billing for noncovered services unless the member, with knowledge that a determination of a lack of medical necessity had been made, agreed to be billed directly. It is undisputed CDC billed directly for services without having notified members that PacifiCare (or United) had determined the services not to be medically necessary. Therefore, United's conclusion that CDC had violated the PacifiCare agreements, whether or not legally correct, was not arbitrary, capricious or irrational.

The right of fair procedure requires only "some meaningful opportunity to be heard." (*Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555.) It "should not be confused with constitutional 'due process.'" (*Dougherty v. Haag* (2008) 165 Cal.App.4th 315, 317.) An opportunity to respond in writing after notice often satisfies common law fair procedure. (*Ezekial v. Winkley*, *supra*, 20 Cal.3d at p. 279; see *Pinsker*, *supra*, at p. 556 [opportunity to respond may be "in writing or by personal appearance"].)

United gave CDC several opportunities to respond to its charges in writing and on May 4, 2007 offered to hold a recorded hearing on CDC's contentions, at which CDC could present evidence and be represented by counsel. CDC responded to the correspondence but not to the offer of a live hearing. CDC argues the offer came too late—after United had already terminated the PacifiCare contracts. The argument is meritless. On April 24, 2007, United notified CDC that it intended to terminate the PacifiCare contracts for cause effective May 1. Actual termination was stayed pending preliminary injunction proceedings initiated on April 30. The record does not indicate

when termination was eventually effected, but it could not have been earlier than May 22, when the trial court denied CDC's request for a preliminary injunction. Therefore, United made the offer before it terminated the PacifiCare contracts. Even if it had not, its correspondence with CDC was itself enough to satisfy fair procedure.

CDC also argues the hearing would have been procedurally unfair because it did not provide for a neutral decisionmaker. No authority requires a neutral decisionmaker.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.